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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORTHWESTERN INDIANA TELEPHONE CO., INC. and NORTHWEST INDIANA CATV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. This Case Presents Fundamentally Important Questions This Court Should Decide	1
II. The Government Has Failed To Justify Its Rules Under Any Constitutional Standard Of Review	4
III. The Petitioners Did Not Waive Their First Amendment Defenses	6

TABLE OF AUTHORITIES

Cases: Page

Aetna Insurance Company v. Kennedy, 301 U.S. 389 (1937) 7
American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) 9
Butz v. Economou, 438 U.S. 478 (1978) 4, 7
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) 6, 7
D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) 6
Edwards v. Arizona, 451 U.S. 477 (1981) 6
Faretta v. California, 422 U.S. 806 (1975) 6
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 6
Fuentes v. Shevin, 407 U.S. 67 (1972) 6
Hormel v. Helvering, 312 U.S. 552 (1941) 10
Johnson v. Zerbst, 304 U.S. 458 (1938) 6, 7
Jordan v. Massachusetts, 225 U.S. 167 (1912) 3
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 3
McKart v. United States, 395 U.S. 185 (1969) 5
Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987) 10
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 6
New York Times v. Sullivan, 376 U.S. 254 (1964) 7
Pickering v. Board of Education, 391 U.S. 563 (1968) 4
Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985); *aff'd and remanded*, 476 U.S. 488 (1986) 8
United States v. O'Brien, 391 U.S. 367 (1968) 2
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 6
Withrow v. Larkin, 421 U.S. 35 (1975) 3
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 2

Administrative Decisions:

Cable Communications Act Rules, 58 Rad. Reg. 2d (P&F) 1 (1985) 7, 9

TABLE OF AUTHORITIES—Continued

	Page
Telephone Company/Cable Television Cross-Ownership (Further Notice of Inquiry), 3 FCC Rcd 5849 (1988)	1, 2
Statutes and Regulations:	
5 U.S.C. § 554	2
5 U.S.C. § 555	2
5 U.S.C. § 556	2
5 U.S.C. § 557	2
47 U.S.C. § 151	9
47 U.S.C. § 303	6
47 U.S.C. § 405(a)	8
Federal Communications Commission Rules and Regulations:	
47 C.F.R. § 1.106(f)	8
47 C.F.R. § 63.54, Note 1(a)	5
Miscellaneous:	
L. Tribe, *American Constitutional Law* 1008 (2d ed. 1988)	1

REPLY BRIEF FOR PETITIONERS

Northwestern Indiana Telephone Company, Inc. ("NITCO") and Northwest Indiana CATV, Inc. ("Cablevision"), hereby reply to the briefs in opposition filed by the Federal Respondents and the National Cable Television Association ("NCTA") in this case.

I. This Case Presents Fundamentally Important Questions This Court Should Decide

This case presents a facial First Amendment challenge to regulations of the Federal Communications Commission ("FCC") banning telephone companies and their affiliates from providing cable television service. Contrary to NCTA's suggestion, *see* NCTA Br. at 9, the decision below not to confront that challenge warrants review by this Court.

The significance of this case extends beyond the constitutionality of the FCC's admittedly overbroad and outmoded cross-ownership rules.[1] For what is at stake here

[1] Professor Tribe is among many commentators who have called upon this Court to confront the constitutional problems posed by new communications technologies, and, in the case of cable television, to revisit "arguably outmoded doctrines" that threaten "the expansion of First Amendment freedoms made possible by new technologies." L. Tribe, *American Constitutional Law* 1008 (2d ed. 1988). This case involves rules that the FCC admits are both outmoded and unnecessarily restrictive of First Amendment rights.

Shortly after it ordered Cablevision to divest its cable systems, the FCC tentatively concluded that its cross-ownership rules inhibit "the development of new services and technologies" and that "a policy of open entry by telephone companies into the cable market, subject to safeguards, would better serve the public interest." *Telephone Company/Cable Television Cross-Ownership Rules (Further Notice of Inquiry)*, 3 FCC Rcd 5849, 5851 (1988). The Government claims that the "relaxation" of the rules was proposed by the FCC on the basis of "policy considerations" rather than either the First Amendment or the Cable Communications Policy Act of 1984 ("Cable Act"). *See* Gov. Br. at 3 n.1. However, while it concluded that its rules were "constitutionally sustainable" under the First Amendment, the FCC conceded that there were "feasible, less re-

is the fundamental fairness of the process by which the FCC, the agency which is entrusted with regulating the electronic media, adjudicates cases implicating First Amendment interests.

This Court must recognize that the FCC's decision to silence Cablevision's cable speech was the product of an informal adjudication. The process by which the FCC reached its decision contained none of the procedural safeguards prescribed by law for formal agency adjudications,[2] and certainly none of the protections available in the judicial process. In particular, there was no attempt by the FCC to separate its investigative and prosecutorial functions from its adjudicative functions.[3]

The FCC was the investigator, prosecutor and judge when this matter was before it. Beyond that, the FCC was an adverse party to NITCO and Cablevision in the review proceedings below, as well as in two collateral district court actions. There was no attempt throughout to separate the FCC's investigative and prosecutorial staffs, some of whom were engaged in adversarial nego-

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strictive alternatives" to its cross-ownership ban. *See id.* at 5864. One of those "less restrictive alternatives" was the affiliation standards of the Cable Act, which the FCC finally proposed to follow. *See id.* at 5866. The FCC, of course, never explained how its current rules are "constitutionally sustainable" in the light of the constitutional requirement to employ the least restrictive alternative. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[2] The Administrative Procedure Act ("APA") prescribes trial-like procedures for formal adjudications alone. *See* 5 U.S.C. §§ 554-557. The *NITCO I* court determined that due process did not require a trial-type hearing in this case, in part because the court accepted the FCC's claim that it "viewed the evidence of affiliation in the light most favorable to petitioners." (A 53.)

[3] A fundamental purpose of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). The APA seeks to ensure the internal separation of these functions by separating within the agency those who investigate and prosecute from those who hear and decide. *See* 5 U.S.C. §554(d).

tiations with petitioners, from the agency's decision-makers. *See* Pet. at 8.

Due process requires an impartial tribunal [4] that ensures neutrality in adjudicative proceedings.[5] The combination of functions within the FCC's decision-making process below hardly preserved the appearance of impartiality. *See* Pet. at 16 n.22. This Court cannot fail to recognize the dangers implicit in the process below, where NITCO and Cablevision were afforded a "trial" before their prosecutor.

The D.C. Circuit took no cognizance whatsoever of the appearance of unfairness in the FCC's strategic decision not to rule on the First Amendment and Cable Act defenses that were squarely presented after the *NITCO I* remand. The court found the FCC's ruling "unexceptionable." (A 11.)

In effect, the D.C. Circuit ruled that the FCC had the discretion on remand to decline to consider non-frivolous claims that its divestiture order was invalid. Clearly, that is the position espoused by the Government before this Court. *See* Gov. Br. at 6. In the circumstances of this case, where the FCC was both prosecutor and judge, the ruling below was akin to allowing a prosecutor to rule on the admissibility of new evidence in a criminal retrial.

No matter how it views the problem of the combination of administrative functions in the ordinary case,[6] this Court should require a more exacting level of judicial scrutiny where a litigant was compelled to relinquish a First Amendment right in an adjudication wherein the

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[4] *Jordan v. Mass.*, 225 U.S. 167, 176 (1912).

[5] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

[6] This Court has recognized that the issue of the combination of administrative functions is a "substantial" one, but it does not involve a due process violation. *See Withrow v. Larkin*, 421 U.S. 35, 51 (1975).

agency was both the prosecutor and judge.[7] This Court has appeared to employ a higher standard in one such case. *See Pickering v. Board of Education*, 391 U.S. 563, 578 n.2 (1968). This case presents the facts on which a standard of First Amendment review of informal agency adjudications can be fashioned that is commensurate to the preferential treatment that this Court affords free speech values.

II. The Government Has Failed To Justify Its Rules Under Any Constitutional Standard Of Review

Tellingly, the Government declined to defend the constitutionality of the FCC's cross-ownership rules that are substantially overbroad when compared to the governing cross-ownership provisions of the agency's enabling statute. Only NCTA attempts such a defense.

NCTA suggests that this Court is foreclosed from reviewing the constitutional claim because the D.C. Circuit did not consider its merits. *See* NCTA Br. at 9. NCTA is simply wrong to suggest that this Court should refuse to decide the constitutional question, even if it

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[7] This Court has held that agency officials enjoy absolute immunity from constitutional tort suits for the exercise of their discretion to initiate and continue administrative proceedings. *Butz v. Economou*, 438 U.S. 478, 516 (1978). It reasoned that a party alleging an unconstitutional prosecution had "ample opportunity" to seek redress by presenting evidence before an "impartial trier of fact" in the agency proceeding itself, or by presenting his claims to the courts. *See id.* In a case such as this, however, where no trial-type hearing before an impartial trier of fact was held, a victim of unconstitutional agency zeal can only seek redress from an appellate court. That remedy would be meaningful only if the reviewing court takes a hard look at the agency's decision-making processes.

We presented the claim to the D.C. Circuit that the FCC's prosecution was constitutionally suspect. *See* Brief for Petitioners at 2; Reply Brief for Petitioners at 6-7, 9 n.15, *NITCO II*. The D.C. Circuit did not address the claim. Indeed, it not only permitted the FCC to avoid a constitutional challenge, but applied preclusion principles that the agency itself never asserted. In effect, the court provided the *post hoc* rationale for the agency's suspect conduct.

rules that the D.C. Circuit should have considered the claim below.

In *McKart v. United States*, 395 U.S. 185 (1969), this Court held that the court of appeals erred in refusing on exhaustion grounds to consider an issue which had not been raised in the trial court. Rather than remanding the case, however, this Court decided the question the lower court had refused to consider. *See* 395 U.S. at 201-02. *McKart* is thus controlling authority that this Court may reach the question of the constitutional overbreadth of the FCC's cross-ownership rules.

NCTA's attempt to defend the FCC's rules by evoking broad principles of fair competition and program diversity misses the point.[8] We are not disputing that the Government has a legitimate interest in preventing anti-competitive conduct. The issue presented is whether the affiliation standard contained in Note 1 of the FCC's rules, which the agency concedes is written in the broadest possible terms,[9] and is more restrictive than the Cable Act standard, amounts to a constitutionally impermissible *means* of achieving the Government's inter-

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[8] NCTA contends that the First Amendment confers no right to exploit the privilege of operating a telephone monopoly by entering into the cable business in the same area. NCTA Br. at 10 n.9. Of course, this argument is based on a false premise that NITCO entered the cable business as a result of Cablevision's activities. (JA 1467, 1479, 1485.) Moreover, the FCC never found that Cablevision owned or controlled, was owned or controlled by, or was under common ownership or control with NITCO. The FCC only found that they were "affiliated" as that term is broadly defined by Note 1 to its cross-ownership rules. *See* 47 C.F.R. § 63.54, Note 1(a).

[9] The FCC admitted below that it intended to "broadly interpret the concept of affiliation" since the rules were adopted in 1970. (A 115.) The *NITCO I* panel noted the obvious when it stated that the FCC had defined the term "affiliate" in "sweeping terms." (A 37.) The *NITCO II* court proceeded to rely on the "broad sweep" of the rules to uphold the FCC's divestiture order. (A 8.)

est in preventing anti-competitive conduct. That key issue NCTA completely ignores.[10]

III. The Petitioners Did Not Waive Their First Amendment Defense

The D.C. Circuit's refusal to consider the constitutional challenge below was primarily grounded on the theory that the First Amendment defense was waived when not asserted before the FCC prior to the *NITCO I* remand. (A 9-10.) Before this Court, we relied on *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) for the proposition that an implied First Amendment waiver should not have been found below. *See* Pet. at 21-22.

To uphold the First Amendment waiver here under *Butts*, this Court must find clear and compelling evidence that NITCO and Cablevision knowingly and intelligently relinquished their First Amendment defense during the "initial proceedings" before the FCC.[11] When this Court

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[10] NCTA's reliance on *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) is misplaced. *See* NCTA Br. at 9 n.9. That decision was based upon the FCC's authority to regulate broadcasting and the exercise of that authority to achieve diversification of programming offered to the public by requiring owners of more than one media of mass communications in a particular area to choose one or the other mass media to operate. *See* 47 U.S.C. § 303; *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Telephone companies and their "affiliates" are not media of mass communications. Thus, banning them from cable television will not foster diversification. Moreover, the cross-ownership ban denies the public the opportunity to hear one class of speakers. Therefore, unlike cross-ownership bans involving broadcasting stations and other media, the regulation at issue here results in a *decrease*—not an increase—in diversification. As a result of the divestiture order in this case, rural communities in Indiana were deprived of both diversity and competition in the cable marketplace.

[11] A waiver of constitutional rights must be voluntary, knowing, and intelligent, *Faretta v. California*, 422 U.S. 806, 835 (1975); *Edwards v. Arizona*, 451 U.S. 477, 482-85 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938),

applies the presumption against First Amendment waivers to the exigent circumstances that existed when this case was argued before the FCC in 1983-84,[12] no knowing waiver can be found under the *Butts* test.

This case was submitted to the FCC between October 13, 1983 and July 31, 1984, when the administrative record closed. (JA 1-1431.) The parties argued the case entirely under the FCC's existing cross-ownership rules. After the record closed, there was a "radical change" in the governing law: Congress enacted the Cable Act, which did not take affect until December 29, 1984.[13] The new law contained the less-restrictive cross-ownership provisions that provided the entire basis for the First Amendment overbreadth defense and, obviously, the Cable Act claim.

The Cable Act required the FCC to adopt new rules implementing the statute by April 30, 1985.[14] However,

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and must be established by "clear" and "compelling" evidence. *See Butts*, 388 U.S. at 130.

[12] This Court has instructed courts to " 'indulge in every reasonable presumption against waiver' of fundamental constitutional rights, and . . . [not to] presume asquiescence in the loss of fundamental rights.' " *Johnson*, 304 U.S. at 464 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). The *NITCO II* court did not follow that instruction, when it *sua sponte* found a First Amendment waiver below.

[13] Recognizing that the *Butts* test is dispositive here, both the Government and NCTA try to distinguish the case on its facts. *See* Gov. Br. at 5-6; NCTA Br. at 12-13. The Government argues that *New York Times v. Sullivan*, 376 U.S. 254 (1964), worked a "radical change" in libel law, while the First Amendment protection for cable speech had been "suggested" by prior decisions of this Court. *See* Gov. Br. at 5 & n.2. That contention is virtually identical to the "handwriting on the wall" argument this Court rejected in *Butts*. *See* 388 U.S. at 144. In any event, the argument fails entirely, like the *NITCO II* ruling, to confront the First Amendment waiver test set forth in *Butts*.

[14] Congress gave the Commission 180 days from the enactment of the Cable Act (October 30, 1984) to adopt new rules. *See Cable Communications Act Rules*, 58 Rad. Reg. 2d (P&F) 1, 5 (1985).

the FCC did not wait to decide this cross-ownership case until it completed its evaluation of the Cable Act and adopted its new cross-ownership rules. The FCC decided this case under its *old* rules on March 1, 1985, two months before it was required to adopt *new* rules. (A 103.)[15]

Under the *NITCO II* reasoning, which was premised on procedural regularity (A 11), NITCO and Cablevision knowingly waived both the First Amendment and Cable Act defenses by not presenting them to the FCC by April 17, 1985.[16] The D.C. Circuit apparently decided not only that we should have presented the first challenge to the cross-ownership rules under the First Amendment without the benefit of the Ninth Circuit's decision in *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403 (9th Cir. March 1, 1985), *aff'd and remanded*, 476 U.S. 488 (1986),[17] but that we should have *foreseen* that the new cross-ownership rules that the

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[15] This was not the only time that the FCC appeared to rush to a judgment in this case just prior to issuing Cable Act decisions favorable to NITCO and Cablevision. *See* Pet. at 16 n.22. In this instance, had it decided this case after adopting its new Cable Act rules, the FCC's first decision would have had to address the Cable Act issues the D.C. Circuit found so "intriguing" but left undecided. (A 13.)

[16] The FCC's divestiture order was released on March 18, 1985. (A 103.) Both the statute and the FCC's rules afforded NITCO and Cablevision only 30 days to request the FCC to reconsider its action. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

[17] NCTA cites the Ninth Circuit's decision in *Preferred* as the case decided "even before the FCC's first decision in this matter" that should have alerted us to the First Amendment defense. *See* NCTA Br. at 13. The Ninth Circuit decided the case on March 1, 1985, and corrected its decision on May 20, 1985. *See* 754 F.2d at 1396. Thus, the case had not been officially reported when the FCC first decided this case, or when we were required to present our claims on reconsideration.

FCC would *subsequently* adopt would be overbroad under the new Cable Act.[18]

The FCC was obviously aware of the pressing circumstances under which we were forced to litigate; yet it never claimed that we knowingly waived our First Amendment or Cable Act claims. Waiver was found by the *NITCO II* court without any apparent application of the *Butts* test to the particular circumstances of this case. Moreover, the *NITCO II* court found waiver in part on the basis of a misreading of *NITCO I* and our arguments before the FCC.[19]

The Government and NCTA argue in effect, as the D.C. Circuit apparently assumed below, that private litigants must be held to a standard of constitutional expertise far above that displayed by the federal officials of the expert agency charged with the regulating the electronic media. It was, after all, the FCC that was under the duty to conform its rules to the Cable Act, *see American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567-69 (D.C. Cir. 1987); to "execute and enforce" the provisions of the new statute, *see* 47 U.S.C. § 151;

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[18] The FCC released its decision adopting its new cross-ownership rules on April 19, 1985, *see Cable Act Rules*, 58 Rad. Reg. 2d (P&F) at 1, two days after our statutory deadline to present our claims.

[19] The *NITCO II* court stated that the *NITCO I* panel had "observed" that we had "actually argued" before the FCC that the Cable Act did not apply to this case. (A 12.) The *NITCO I* court, however, observed only that we "actually suggested" that the Cable Act did not apply because of the date of its enactment. (A 42.) Neither statement was a fair reading of what we actually argued.

After we brought this case to the D.C. Circuit in *NITCO I*, we sought a stay *pendente lite* from the FCC. (JA 1724.) We subsequently argued that NITCO and Cablevision were in compliance with the Cable Act. (JA 1839-40.) A footnote to that argument contained the statement that we "recognize that the provisions of the Cable Act were not in force until December 29, 1984." (JA 1840.) We never conceded that the Cable Act did not apply at all in this case. In any event, the statement was made after the FCC had decided the case, and jurisdiction over the matter had passed to the D.C. Circuit.

and to explicitly consider constitutional challenges to its regulations. *See Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). Yet, the FCC did not see the post-Cable Act overbreadth of its rules until we raised the issue, and the agency is still grappling with that issue two years later. *See supra* note 1. It is difficult for us to accept, therefore, that we should have discerned our First Amendment claims during a 30-day "window" in 1984, when the relevant law was in the process of change.

Simply speaking, there is no clear and compelling evidence that NITCO and Cablevision waived their rights. Nor was the conduct of this case sufficiently regular to warrant an application of any judicial principle of issue preclusion.[20] It would be flatly unjust, under the extraordinary circumstances of this case, to uphold the divestiture of cable systems, the operation of which are protected by the First Amendment, by precluding consideration of that fundamental constitutional right. As this Court stated in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy.

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[20] This Court should not uphold the D.C. Circuit's wholesale application of judicial preclusion principles to this case of informal agency adjudication. As NCTA correctly recognized, those principles "are concerned only with internal judicial processes." NCTA Br. at 11. Such judicial principles can be applied fairly only to an administrative adjudication that provided the safeguards available in the judicial process. This clearly was not such a case.

Respectfully submitted,

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